Supreme Court, U.S.
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No. 95-783

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE STATE OF OKLAHOMA,
Petitioner,

v.

BARBARA LYNN BELL,
Respondent.

On Petition for a Writ of Certiorari
to the Oklahoma Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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November, 1995
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QUESTIONS PRESENTED

1. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the defendant was "presumed to be not guilty" so impermissibly lessened the burden of proof upon the state that it denied the defendant his constitutional right to a fair trial as articulated in *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

2. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the defendant was "presumed to be not guilty" is an error constituting a substantial violation of constitutional right that may never be considered harmless.

3. Whether the Court of Criminal Appeals erred in finding that an instruction advising the jury that the state had the burden of proving all the material allegations of the information beyond a reasonable doubt before the jury could find the defendant guilty violated the Due Process Clause pursuant to *Sullivan v. Louisiana*, 508 U.S. ____, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

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No. _____,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

THE STATE OF OKLAHOMA,

Petitioner,

v.

BARBARA LYNN BELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Oklahoma, by and through W.A. Drew Edmondson, Attorney General of the State of Oklahoma, respectfully requests that this Court issue a Writ of Certiorari to review the decision of the Court of Criminal Appeals for the State of Oklahoma.

OPINION BELOW

The Court of Criminal Appeals for the State of Oklahoma issued it accelerated docket order in *Bell v. State*, Court of Criminal Appeals Case No. F-93-1286. The order was issued August 22, 1995. A petition for rehearing was

not filed. This petition for writ of certiorari is due to be filed on November 20, 1995.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATEMENT OF CASE

The defendant, Barbara Lynn Bell, was convicted of the crime of Murder in the Second Degree in Tulsa County, Oklahoma, in Case No. CF-93-479, and received a sentence twenty (20) years imprisonment.

The defendant raised two propositions of error on appeal. The grounds related to the instructions of the trial court that the defendant was presumed to be not guilty and that the prosecution had the burden to prove the material allegations of the information beyond a reasonable doubt before the jury could convict the defendant.

The Oklahoma Court of Criminal Appeals reversed the conviction pursuant to its decision in *Flores v. State*, 896 P.2d 558 (Okla. Crim. App. 1995), *reh'g denied*, 899 P.2d 1162 (1995). A Petition for Writ of Certiorari challenging that decision is pending in *State v. Flores*, United States Supreme Court No. 95-493.

SUMMARY OF THE ARGUMENT

The issues in this case are identical to those raised in *Flores v. State*, 896 P.2d 558 (Okla. Crim. App. 1995) *reh'g denied*, 899 P.2d 1162. In *Flores*, the Oklahoma Court of Criminal Appeals misapplied *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976), and *Taylor v. Kentucky*, 436 U.S. 478, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978), so as to find that an instruction advising the jury that a defendant is presumed to be not guilty is a misstatement of law diluting the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. The Court of Criminal Appeals also erred in finding that the instruction is an error of such magnitude that it can never be held to be harmless.

Furthermore, the Court of Criminal Appeals in *Flores, supra,* misapplied this Court's opinion in *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), in concluding that an instruction advising the jury that the prosecution had the burden of proving the material allegations of the information--rather than the elements of the offense--beyond a reasonable doubt was a violation of the Due Process Clause.

REASONS FOR GRANTING WRIT

I.

THE OKLAHOMA COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THAT THE DEFENDANT WAS "PRESUMED TO BE NOT GUILTY" SO IMPERMISSIBLY LESSENED THE BURDEN OF PROOF UPON THE STATE THAT IT DENIED THE DEFENDANT HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AS ARTICULATED IN *ESTELLE V. WILLIAMS*, 425 U.S. 501, 96 S. CT. 1691, 48 L. ED. 2D 126 (1976).

At the defendant's trial, the trial court gave an instruction stating that the defendant was presumed to be not guilty of the crime charged against her in the information until her guilt was established beyond a reasonable doubt; the instruction also stated that the presumption continued with her unless every material allegation of the information was proven by evidence beyond a reasonable doubt.

This instruction deviated from the Oklahoma Uniform Jury Instructions--Oklahoma, which is prescribed by Okla. Stat. tit. 12, § 557.2 (1991). However, a violation of § 557.2 is not automatically reversible under Oklahoma state law. *Fontenot v. State*, 881 P. 2d 69, 84 (Okla. Crim. App. 1994). Whether the error in the instruction required reversal

required the Court of Criminal Appeals to determine whether the error violated a substantial constitutional or statutory right. Okla. Stat. tit. 20, § 3001.1 (1991). If the error in an instruction violated a constitutional right, the court may still consider whether it is harmless under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The Court of Criminal Appeals based its decision reversing the defendant's conviction solely on *Flores, supra*. Although *Flores* recognized that an instruction on the presumption of innocence is not constitutionally required in all cases but was required by state statute, Okla. Stat. tit. 22, § 836 (1991), the court relied on federal constitutional law to demonstrate that the instruction on the presumption to be not guilty required reversal to prevent a "dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." *Flores*, 896 P. 2d at 562, citing *Estelle v. Williams*, 425 U.S. at 503, 96 S. Ct. at 1692-93.

The Court of Criminal Appeals misinterpreted this Court's statement of purpose of the presumption of innocence. The court stated that the presumption was a command to the jury "to start their deliberations from the premise there exists an absence of guilt." *Flores*, 896 P. 2d at 562. The court distinguished the presumption of being not guilty as a different command to the jury: to begin its deliberations from the premise there is an absence of sufficient proof of guilt. *Id.* However, this Court has identified the presumption of innocence instruction as a prophylactic for ensuring that the accused is judged solely on

the basis of the evidence adduced at trial. *Taylor v. Kentucky* 436 U.S. 478, 486, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978). The advantage of an instruction on the presumption of innocence--beyond just a restatement that the burden is on the prosecution to prove its case beyond a reasonable doubt--is that it:

> conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider in the material for their belief, *nothing but the evidence, i.e.,* no surmises based on the present situation of the accused.

Taylor, 436 U.S. at 485, quoting 9 J. Wigmore, Evidence § 2511, p. 407 (3d ed 1940) [Emphasis in original].

An instruction that the accused is presumed innocent and an instruction that she is presumed not guilty are indistinguishable in the function of emphasizing to the jury that the burden is upon the state to prove the elements of the charge beyond a reasonable doubt. Clearly, use of "presumed innocent" as a talismanic phrase is not necessary to fulfill the constitutional functions of the instruction. In *Taylor*, this Court quoted with approval from Professor Wigmore:

> It is now generally recognized that the "presumption of innocence" is an inaccurate, shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charged is presumed to be not guilty is to say in another form that the proponent of the claim or charge must evidence it. Wigmore 407.

436 U.S. at 483, n. 12. Perhaps Professor Wigmore's use of both phrases interchangeably led this Court to emphasize that the phrase "'presumption of innocence'-- or any other form of words" may not be constitutionally mandated so long as the principle that guilt be established by probative evidence and beyond a reasonable doubt is not diluted. 436 U.S. at 485-86.

Other instructions given by the trial court stated that the burden was on the state to prove by evidence all the material allegations in the information and that the failure of the state to meet its burden required the jury to acquit (O.R. 175); in addition, the court instructed that the state had the burden of proving each element beyond a reasonable doubt for the offenses of murder in the first degree (O.R. 176), murder in the second degree (O.R. 182), and manslaughter in the first degree (O.R. 186). When taken as a whole, the jury could only have concluded that the burden was on the state to prove by evidence each element of the offense beyond a reasonable doubt.

The instruction on the presumption of being not guilty satisfied *Taylor*, as modified by *Kentucky v. Whorton*, 441 U.S. 786, 99 S. Ct. 2088, 60 L. Ed. 2d 640 (1979), a conclusion shared by the Ohio Court of Appeals in *City of Bucyrus v. Fawley*, 50 Ohio App. 3d 25, 552 N.E.2d 676, 677 (Ohio App. 1988).

The Court of Criminal Appeals found in *Flores,* 896 P.2d at 562, that use of an instruction that the defendant was presumed not guilty so undermined the presumption of innocence as to effectively deny the defendant's constitutional and statutory rights; the rights identified by the court were his constitutional right to have his guilt established by probative evidence and beyond a reasonable

doubt. The instruction on a presumption of being not guilty did not dilute this right and this Court should grant certiorari to correct the error in the manner the Court of Criminal Appeals interpreted *Estelle v. Williams*, and *Taylor*.

II.

THE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THE DEFENDANT WAS "PRESUMED TO BE NOT GUILTY" IS AN ERROR CONSTITUTING A SUBSTANTIAL CONSTITUTIONAL RIGHT THAT MAY NEVER BE HARMLESS.

In *Flores*, the sole basis for the reversal of the defendant's conviction in the instant case, the Court of Criminal Appeals identified the defendant's right to an instruction on the presumption of innocence as statutory but then identified the interests serviced by the instruction by reference exclusively to United States constitutional law; the court found the instruction that the defendant was presumed not guilty amounted "to an **impermissible** lessening of the burden of proof." *Flores v. State*, 896 P.2d 558, 562 (Okla. Crim. App. 1995) [Emphasis added]. While the opinion's next sentence suggests that the error might upon occasion be considered harmless in light of the instructions when taken as a whole ("Such error was not cured by any other instructions specifically, an appropriate burden of proof instruction." *Id.*), it is clear that the court concluded that the error in use of an instruction of the presumption of being not guilty is not subject to harmless error analysis on a case-by-case basis under *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

This conclusion is supported by the opinions concurring in and dissenting to the Order Denying Rehearing, *Flores v. State*, 899 P.2d 1162 (Okla. Crim. App. 1995). Judge Chapel concluded that the instructional error cannot be dismissed as harmless lest it "undermine two crucial tenets of our democratic society: that a criminal conviction must be support by trial evidence which establishes guilt beyond a reasonable doubt; and that out government is one of laws and not of men." *Id.* at 1167. Judge Strubhar wrote that she "agonized over the decision to find such an error may never be harmless." *Id.* at 1168. The dissenting opinion of Presiding Judge Johnson confessed that he had misinterpreted the language in *Flores* relative to harmless error analysis; he would have found the error of a presumed not guilty instruction subject to harmless error analysis but that it was not harmless in Flores' case. *Id.* at 1169-70. Judge Lumpkin's dissent discusses extensively the harmless-error doctrine in reference to presumed not guilty instructions. *Id.* at 1170-1177. Finally, this conclusion is further supported by the dissenting opinion of Judge Lumpkin attached to the Accelerated Docket Order being challenged in this petition.

In *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), this Court stated that most constitutional errors can be harmless and supplied a list of examples. Many of these errors identified as subject to harmless error analysis on a case-by-case basis arguably involved a lessening of the burden upon the prosecution: *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504, 107 S. Ct. 1918, 95 L.Ed. 2d 439 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92

L. Ed. 2d 460 (1986) (jury instruction containing an erroneous rebuttable presumption). These were identified as "trial errors" in contrast to "structural errors" which can never be subject to harmless error analysis. *Fulminante*, 499 U.S. at 307-09.

The error in a presumed not guilty instruction identified by the Court of Criminal Appeals is that it undermined the presumption of innocence as to effectively deny the constitutional and statutory protections the presumption affords, i.e., that jurors "put away from their mines all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced." *Flores*, 896 P.2d at 562, quoting *Taylor v. Kentucky*, 436 U.S. at 485. If this is error, it is a trial error and subject to harmless error analysis.

As Chief Justice Rehnquist stated in his concurring opinion in *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), "there is a 'strong presumption' that any error will fall into the first of these categories. Thus it is the rare case in which a constitutional violation will not be subject to harmless error analysis." *Id.* 508 U.S. ___, 113 S. Ct. 2078, 124 L. Ed. 2d at 191.

The Court of Criminal Appeals essentially found in *Flores* that the instruction on the presumption of not guilty violated the defendant's right to a fair trial and her right that guilt be established by probative evidence beyond a reasonable doubt as articulated in *Estelle v. Williams*, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). These violations are trial error and not structural error. The decision that this instructional error can never be harmless conflicts with clear statements of the law by this Court.

Certiorari should be granted to correct this error and to allow the Court of Criminal Appeals to apply the harmless error standard to the presumed not guilty instruction.

III.

THE COURT OF CRIMINAL APPEALS ERRED IN FINDING THAT AN INSTRUCTION ADVISING THE JURY THAT THE STATE HAD THE BURDEN OF PROVING ALL THE MATERIAL ALLEGATIONS OF THE INFORMATION BEYOND A REASONABLE DOUBT BEFORE THE JURY COULD FIND THE DEFENDANT GUILTY VIOLATED THE DUE PROCESS CLAUSE PURSUANT TO *SULLIVAN V. LOUISIANA*, 508 U.S. ___, 113 S. CT. 2078, 124 L. ED. 2D 182 (1993).

The Court of Criminal Appeals stated in *Flores*, it was less troubled by the trial court's instruction that the state had the burden of proving the material allegations of the information than by the instruction that the defendant was presumed not guilty. *Id.* 896 P.2d at 563. However, just as the court elevated "presumed innocent" to a talisman, the court has essentially mandated the use of the phrase "elements of the offense." Therefore, despite other instructions defining the elements of the offenses and proscribing a conviction in the event the state failed to prove each element by proof beyond a reasonable doubt (O.R. 175*f*, 186), the court found the "material allegations" instruction violated due process according to *Sullivan v. Louisiana*, 508 U.S. ___, 113 S. Ct. 2078, 2080, 124 L. Ed. 2d 182 (1993).

All the essential elements of an offense are to be alleged in an information. *Miller v. State*, 827 P.2d 875, 877 (Okla. Crim. App. 1992). The defendant in this case has not challenged the information for failing to allege the essential elements of murder in the first degree. The use of the phrase "material allegations of the information" in this case did not negate the elements of the offense; if anything, the instruction increased the burden of proof upon state in proving murder in the first degree. The instructions as a whole clearly stated the burden was upon the state to prove each element of the offense beyond a reasonable doubt.

The Court of Criminal Appeals erred in holding in effect that *Sullivan v. Louisiana*, supra, mandated use of the phrase "elements of the offense." The issue in that case was whether a constitutionally deficient definition of reasonable doubt is subject to harmless error analysis. In the instant case, however, there was no definition--deficient or otherwise--of reasonable doubt at issue. However, where as here, the instructions when taken as a whole clearly place the burden of proof upon the state to prove all the elements of the offense charged beyond a reasonable doubt before the jury may find the defendant guilty, then use of the phrase "material allegations" did not violate due process.

This Court should grant certiorari to review and correct the erroneous conclusion of the Court of Criminal Appeals that use of the phrase "material allegations" violated due process.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari to review the decision of the Oklahoma Court of

Criminal Appeal. The decision is contrary to the law of this Court.

Respectfully submitted,

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APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

BARBARA LYNN BELL,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. F-93-1286**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

ACCELERATED DOCKET ORDER

On January 28, 1993, the Appellant was charged with First Degree Murder in the District Court of Tulsa County, Case No. CF-93-0479. A jury found Appellant guilty of Second Degree Murder and recommended a sentence of twenty (20) years imprisonment. The Honorable Clifford Hopper sentenced Appellant according to the jury's recommendation. From this Judgment and Sentence, Appellant has perfected this appeal.

Appellant made application for this appeal to be placed on the Accelerated Docket pursuant to 22 O.S.Supp.1994, Ch.18, App., Rules of the Court of Criminal Appeals, Rule 11.3. No objection was made by Appellee. The propositions or issues were presented to this Court in oral argument August 17, 1995, pursuant to Rule 11.2(F). At the conclusion of oral argument, the parties were advised of the decision of this Court.

Appellant raised two propositions of error on appeal:

I. The trial court committed reversible error by giving a modified version of OUJI-CR-903; and

II. The trial court committed reversible error by giving a modified version of OUJI-CR-109.

IT IS THEREFORE THE ORDER OF THIS COURT, by a three (3) to one (1) vote, after hearing oral argument and after a thorough consideration of Appellant's propositions of error and the entire record before us on appeal, the Judgment and Sentence of the Trial Court is **REVERSED** and **REMANDED** for a new trial pursuant to Flores v. State, 896 P.2d 558 (Okl.Cr.1995), reh'g denied, __ P.2d ___, 66 O.B.J. 2161 (Okl.Cr.1995).

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of August, 1995.

CHARLES S. CHAPEL, Vice Presiding Judge, Specially Concurring

GARY L. LUMPKIN, Judge
Dissenting

JAMES F. LANE, Judge

RETA M. STRUBHAR, Judge

CHAPEL, V.P.J., SPECIALLY CONCURRING:

I do not particularly mind Judge Lumpkin continuing to beat a dead horse as he has persisted in doing with his inane separate writings to the Flores cases. However, I must object when he asserts "the majority is not being candid regarding the legal basis for the decision."

In point of fact the majority has been very precise and, indeed, absolutely clear in its opinions on this issue. Judge Lumpkin's problem is that he, like too many judges, at some point begin believing that their own dicta is the law. Some time ago Judge Lumpkin authored an opinion in ***Simpson v. State.***[1] In that opinion he had a revelation on the harmless error doctrine. Since his revelation, he has preached the doctrine in almost every case. Indeed, if one listens to Judge Lumpkin there is virtually no error that cannot be found to be harmless.

In ***Simpson*** and in his dissent to this Order (and in most all of his separate writings dealing with ***Flores*** issues) Judge Lumpkin simply misinterprets his own revelation. I will concede that Judge Lumpkin has a fairly good grasp of the harmless error doctrine under Federal law. The problem is, however, his knowledge is of very little use because the harmless error doctrine in Oklahoma is set forth at 21 O.S.1991, § 3001.1.

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[1]876 P.2d 690 (Okl.Cr.1994). Judge Lumpkin did not understand the issues in ***Simpson*** any more than he understands them now. I tried in a dissent to ***Simpson*** point out the error of his ways. But, alas, it was for naught.

In ***Flores***, we applied the Oklahoma statutory harmless error rule and we determined the error was not harmless. In the words of the statute, we found the error to be a "substantial violation of a constitutional or statutory right." Judge Lumpkin can continue to write that the Court did not apply harmless error analysis in ***Flores*** until the cows come home. His writings will not, however, change the law or the facts.

LUMPKIN, JUDGE: DISSENTING

I dissent, based on my dissent in **Flores v. State**, ___ P.2d ___, 66 OBJ 367, **reh'g denied**, ___ P.2d ___, 66 OBJ 2161 (Okl.Cr.1995); ___ P.2d ___, 66 OBJ 2161, 2167 (Lumpkin, J., dissenting on petition denying rehearing).

The comments made during the oral argument in this case expose the fallacy of the majority's reasoning. Based on those statements it is evident the majority of the Court seems to believe a harmless error analysis was conducted in **Flores**. This is incorrect, under any definition of the term I know.

This is best shown by language in **Sullivan v. Louisiana**, 508 U.S. ___, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), an opinion analyzing an error in defining "beyond a reasonable doubt." There, the question before the Court was not whether the error was harmless beyond a reasonable doubt; the question was whether a harmless error analysis could even be conducted **at all**. **See Id.**, 508 U.S. at ___, 113 S.Ct. at 2081,[1] 2082,[2] 2083.[3] The Court determined the error

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[1] "Although most constitutional errors have been held amenable to harmless-error analysis, see Arizona v. Fulminante, 499 U.S. ----, ----, 111 S.Ct. 1246, 1252, 113 L.Ed.2d 302 (1991) (opinion of REHNQUIST, C.J., for the Court) (collecting examples), some will always invalidate the conviction. Id., at ----, 111 S.Ct. at 1254 [giving examples]. The question in the present case is to which category the present error belongs."

[2] "Once the proper role of an appellate court engaged in the Chapman inquiry is understood, the illogic of harmless-error review in the present case becomes evident." . . . "Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: . . ."

was structural, not subject to harmless error analysis. **See also Bartell v. State**, 881 P.2d 92 (Okl.Cr.1994).

The same is true here. In **Flores**, it appears a majority of this Court conducted an analysis of the error to determine not whether it was harmless in that particular case, but whether it could be harmless at all. The difference is subtle, but important. One is harmless error analysis; the other is an analysis to determine whether the error can be determined harmless, or whether it is structural, and therefore can never be harmless. Clearly, the majority determined the error in **Flores** -- and here as well -- is structural. To say a harmless error analysis was conducted is not supported by the law or facts and the majority is not being candid regarding the legal basis for the decision.

This procedural posture of this case dramatically illustrates this point. Because this was not a case automatically assigned to the accelerated docket, Appellant was limited to three propositions of error. **See** 22 O.S.Supp.1994, Ch. 18, App. **Rules of the Court of Criminal Appeals**, Rule 11.3(D). Despite this, Appellant raised only two propositions of error: the two erroneous instructions discussed and found faulty in **Flores**. Because Appellant has alleged only error in the **Flores** instructions and no other, this Court has no other error before it. In fact, the Appellant filed a waiver of all other allegations of error in accordance with Rule 11.3 and Form 13.13. Pursuant to the

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[3]"The deprivation of [the right to a jury trial, the essential consequence of an erroneous instruction defining 'beyond a reasonable doubt'], with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as 'structural error.'"

Rules of the Court of Criminal Appeals "[r]eview of other alleged propositions or issues of error from the same trial record [not raised in the accelerated docket application] will be foreclosed." **Id.** Consequently, under any harmless error analysis this Court could make based on the issues properly raised and subject to review, the error must be held harmless -- if such an analysis were possible.

This Court, in reversing this case, reveals the flaws in its own reasoning and acknowledges its true holding in **Flores** that the giving of a "presumed not guilty" instruction is a structural error not subject to harmless error analysis. Accordingly, I dissent.